

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD HUNTER ELLIS,

Defendant-Appellant.

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UNPUBLISHED

January 16, 2001

No. 210011

Wayne Circuit Court

LC No. 95-008835

Before: Markey, P.J., and Murphy and Collins, JJ.

PER CURIAM.

Defendant was charged with alternative theories of first-degree premeditated murder and first-degree felony murder, MCL 750.316; MSA 28.548, and an additional count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Following a jury trial, he was convicted of two counts of second-degree murder, MCL 750.317; MSA 28.549, and felony-firearm. He was sentenced to two concurrent terms of thirteen to twenty years each for the murder convictions, and a consecutive two-year term for the felony-firearm conviction. Defendant appeals by right. We affirm defendant's convictions and sentences for one count of second-degree murder and felony-firearm, but vacate the second conviction for second-degree murder.

Defendant argues that he was denied a fair trial because the prosecutor presented a significant amount of personal background information about the victim, which defendant contends was calculated to elicit sympathy for the victim. Because defendant did not object below to the challenged testimony, appellate relief is precluded absent a showing of plain error (i.e., error that is clear or obvious) affecting defendant's substantial rights (i.e., error that affected the outcome of trial). Moreover, a reviewing court should not reverse unless it concludes that defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999).

Claims of prosecutorial misconduct are decided case by case. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Prosecutorial misconduct cannot be based on good faith efforts to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999); *People v Missouri*, 100 Mich App 310, 328; 299 NW2d 346 (1980).

For the most part, the challenged evidence was relevant to provide context to the parties' conflicting theories in the case. During closing argument, the prosecutor referred to the evidence to explain how it supported her theory of the case, not to evoke sympathy. Thus, defendant has not shown that the admission of this evidence constituted plain error.

Next, defendant argues that improper remarks by the trial judge deprived him of a fair trial. Defendant did not object to the challenged remarks at trial. Therefore, we review this unpreserved issue to determine whether plain error affected defendant's substantial rights. *Carines, supra* at 763. We do not condone the trial judge's remarks. Nevertheless, viewed in context, it is apparent that the judge was directing his comments to all parties, not just the defense; thus, the judge's comments did not pierce the veil of judicial impartiality to the point that the jury was unduly influenced. *People v Davis*, 216 Mich App 47, 49-50; 549 NW2d 1 (1996); *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). Further, it was not improper for the judge to briefly interject himself into the examination of defendant when defendant was being evasive during questioning. *Davis, supra*.

Defendant next claims that the testimony of Alice Simms was improperly admitted on rebuttal because her testimony did not constitute proper rebuttal evidence, and Simms' telephone records were not previously disclosed to defendant. The admissibility of rebuttal evidence is within the sound discretion of the trial court, and this Court will not reverse absent a clear abuse of discretion. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). The challenged evidence was offered to contradict defendant's claim that the victim had carjacked him on the date and time in question and, therefore, was proper rebuttal evidence. *Id.* at 399. Also, in light of other testimony that the victim called his fiancée often and that telephone bills would so reflect, we do not believe the rebuttal evidence surprised defendant. In any event, defendant did not establish that he was unable to properly cross-examine the witness regarding the disputed evidence or that he needed more time to investigate the authenticity of the telephone bill. Defendant's additional arguments concerning the admission of this evidence were not raised in the trial court and, therefore, are unpreserved. Moreover, defendant has not otherwise established any plain error affecting his substantial rights arising from the admission of this evidence. *Carines, supra*.

Next, we reject defendant's unpreserved claim that testimony from the victim's fiancée to the effect that the victim did not own or possess a gun on the date in question constituted improper character evidence. The testimony was not offered as evidence of the victim's peaceful character, but to rebut the defense theory that the victim was armed with a gun and that defendant shot the victim in self-defense. Because plain error has not been shown, reversal is not warranted. *Carines, supra*.

Defendant also claims that numerous episodes of prosecutorial misconduct denied him a fair trial. Defendant did not object to most of the matters that he now challenges on appeal. With regard to those unpreserved matters, we conclude that defendant has not demonstrated any plain error affecting his substantial rights stemming from the prosecutor's remarks. *Carines, supra*; see, also, *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995); *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Also, as we have previously concluded, defendant has not established that the prosecutor improperly introduced evidence of

the victim's peaceful character or personal background. Finally, defendant has not established that the prosecution improperly failed to disclose exculpatory evidence during the prior appeal in this case. Simply because the prosecutor argued that the case did not involve a close-range shooting does not establish that exculpatory evidence was withheld from defendant.

Defendant next argues that he was denied the effective assistance of counsel. In order for this Court to reverse because of ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced him that he was denied his right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). To establish prejudice, defendant must show that there was a reasonable probability that, but for his counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Having reviewed defendant's numerous allegations of deficient performance, we find no basis for relief because of ineffective assistance of counsel. Defendant's allegations are either unsupported by the record, *People v Hoag*, 460 Mich 1, 6-8; 594 NW2d 57 (1999), involve matters of trial strategy that we will not second-guess, *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991), involve issues discussed elsewhere in this opinion for which defendant has not established any error affecting his substantial rights, or involve matters that had no effect on the outcome of the proceedings, *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997).

Next, no plain error has been shown with respect to defendant's unpreserved claims of instructional error. *Carines, supra*. The court's "reasonable doubt" instruction was given in accordance with CJI2d 3.2(3), and that instruction adequately conveyed the concept of reasonable doubt to the jury, notwithstanding the absence of "moral certainty" language. *People v Snider*, 239 Mich App 393, 420-421; 608 NW2d 502 (2000); *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999).

Defendant also argues that the late endorsement of witness Ira Gray was error. Defendant did not object to Gray's testimony, thereby precluding relief absent a showing of plain error affecting defendant's substantial rights. *Carines, supra*. Good cause was shown for Gray's late endorsement where he was called only as a rebuttal witness, and his testimony became relevant only after defendant had testified. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995); *People v Kulick*, 209 Mich App 258, 265; 530 NW2d 163 (1995), remanded for reconsideration on other grounds 449 Mich 851 (1995). Further, defendant has not shown that the late endorsement prejudiced him.

Although the trial court had initially ruled that Gray's testimony was inadmissible, defendant never objected when Gray was subsequently called to testify. Thus, we are unable to conclude that the trial court's earlier ruling entirely precluded Gray's testimony. Furthermore, we believe that Gray's testimony was properly admitted. There was sufficient circumstantial evidence to establish that the gun used to shoot the victim was either an automatic or semi-automatic handgun. Because Gray's testimony addressed both types of weapons, it was not improper as being unduly speculative.

Finally, defendant has not shown that trial counsel was ineffective for not requesting an instruction on other lesser included crimes. *Pickens, supra*. The decision whether to request an instruction on a lesser included offense is a matter of trial strategy. *People v Thorin*, 126 Mich App 293, 299; 336 NW2d 913 (1983). It is legitimate trial strategy to forego instructions on lesser included offenses to force the jury into an "all or nothing" decision. *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982); *People v Rone (On Second Remand)*, 109 Mich App 702, 718; 311 NW2d 835 (1981). Thus, defendant has not shown that his attorney engaged in unsound strategy by not requesting an instruction on manslaughter. *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1996).

In light of the foregoing discussion, we reject defendant's claim that he was denied a fair trial due to the cumulative effect of several errors at trial. *Cooper, supra* at 659-660.

Defendant's two-year determinate sentence for felony-firearm is not unconstitutional. *Cooper, supra* at 660-664. See, also, *Snider, supra* at 426-428.

Because defendant was found guilty of one killing, we agree that his convictions and sentences for two counts of second-degree murder were improper. *People v Zeitler*, 183 Mich App 68, 71; 454 NW2d 192 (1990). Accordingly, we vacate one of the convictions for second-degree murder and remand this matter to the trial court for preparation of a corrected judgment of sentence. Defendant's remaining second-degree murder conviction and sentence are affirmed in all other respects.

We affirm in part, vacate in part, and remand for preparation of a new judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey  
/s/ William B. Murphy  
/s/ Jeffrey G. Collins